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Issue date: 08Jul2002

In the Matter of	:	
	:	
LAWRENCE LEE VINSON,	:	
Claimant,	:	
	:	**CASE NO.: 2001-LHC-02898**
v.	:	
	:	**OWCP NO.: 6-185411**
RESOLVE MARINE SERVICES,	:	
Employer,	:	

Appearances:

Howard L. Silverstein, Esq.
For the Claimant

Neil Bayer, Esq.
For the Employer/Carrier

Before:
Thomas M. Burke
Associate Chief Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq. (hereinafter, "the Act"), as amended, and the regulations promulgated thereunder, 20 C.F.R. Part 702. After due notice, a hearing was held in Ft. Lauderdale, Florida, on October 15, 2001, at which all parties were afforded full opportunity to present evidence and argument, as provided in the Act and the applicable regulations.

At the hearing, Claimant's Exhibits 1 through 27 (hereinafter "CX1" through "CX 27") and Employer's Exhibits 1 through 9, 12,-13, and 16-39 (hereinafter "EX 1" through "EX 39") were admitted into evidence. (Tr. 9-10, 20-21, 344).[1] Following the hearing, the record was kept open for the post-hearing deposition of Dr. Saks, Dr. Girard, Dr. Benson and Robert McLester. (Tr. 343). Following the taking of their depositions, the record was closed except for the submission of post-hearing statements. (Tr. 343-344).

[1]As used herein, "Tr." to the Transcript of the hearing held on October 15, 2001.

The findings and conclusions which follow are based upon a complete review of the record in light of the submissions of the parties and the applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

The parties were unable to stipulate to any issues in this case.

ISSUES

1. Whether the Claimant's claim is covered under the Act.

2. Whether the Claimant gave proper notice to the Employer.

3. Computation of the Average Weekly Wage.

4. Causation.

5. Whether the Section 20(a) presumption applies.

6. Whether the Claimant is entitled to temporary total disability.

7. Reasonable and Necessary Medical Treatment.

FINDINGS OF FACT

Lawrence Lee Vinson (hereinafter "the Claimant") is a thirty eight year old single male who is currently engaged to Linda Lee Tustin. They have been together approximately five years and currently reside at the same residence. The Claimant received his GED and took some courses at the Indian River Community College. He completed nine years of formal education.

He began working at the age of nine at his father's fishing tackle manufacturer corporation. The Claimant quickly became mechanically adept, and by age seventeen he could build and rewire all the machines in his father's business. The Claimant subsequently worked for several different companies, performing supervisor and mechanical duties. As a mechanic, the Claimant is often required to perform physical labor, and he is sometimes required to lift objects weighing as much as one hundred and fifty pounds.

The Claimant owned an auto repair garage in Fort Pierce, Florida, and he met several employees that worked for Marcona Industries. He apparently became friends with several of the employees, and he began to help out with mechanical problems they were having with some of their machines. He performed this labor for free for approximately 6 months, and then he was

advised to speak to the main office about a position with the company. The Claimant interviewed over the phone with Frank Lecky, and he was offered a position with Resolve Operating Services (hereinafter "the Employer") on June 13, 2000. The Claimant's basic duties included maintaining the machinery and overseeing a barge on the site. The Claimant's initial salary was one hundred dollars per day, but this was increased to one hundred and fifty dollars per day when the Employer discovered that the Claimant could repair pumps. The Claimant stated that he worked approximately twelve hours per day, seven days a week.[2] Eventually, the Claimant began working on larger projects.

In August of 2000, the Claimant was asked to go to Puerto Rico to repair a crane. While repairing the crane on August 8, 2000, the Claimant fell into an uncovered man hole and injured his ribs and back. The Claimant stated that he could not breath and he felt pain on his right side. The Claimant reported the accident to the Employer and had someone take him back to his condominium to rest. He attempted to work again on the following day, but the pain prohibited him from doing so. The Claimant visited a hospital in Puerto Rico that evening, where x-rays were taken and he received some medication. After the initial consultation, however, the Claimant was left waiting on a hospital gurney for approximately ten hours. The Claimant became tired of waiting and left the hospital. Neither the Claimant nor the Employer were ever billed by the hospital.

On August 10, 2000, the Claimant was flown back to the United States by the Employer to see a physician in Miami. The Claimant treated with a physician at the Sunshine Medical Center the following day. Medical records from the examination state that the Claimant complained of severe pain and spasms, and the treating physician diagnosed a lower back contusion and right rib strain. The Claimant was placed on no work status until August 14, 2000. X-rays taken of the Claimant's back were negative, revealing a regular pathology. The Claimant was scheduled for a follow-up visit; however, he was given permission by the physician's office to call back instead. He was out of work from August 12 through August 18, 2000. The Employer paid him seven hundred and fifty dollars in sick leave. Apparently an exception was made for the Claimant because the Employer's general policy was not to pay employees for sick leave until they had been employed for a year.

The Claimant returned to work after this period and started working on several different projects. Towards the end of September of the same year, the Claimant was asked to do some repairs on a ship called the *Lana Rose*. The Claimant was sick at this point, and he was reportedly still sore from the injuries he sustained in Puerto Rico. The Claimant attempted to work on the *Lana Rose* for several days but was eventually forced to take off more time due to his illness and injuries. The Claimant was out of work approximately a month, and he did not receive any payment or sick leave during this period. When the Claimant returned to work in

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[2]A summary of the Claimant's work history with the Employer (Ex 3) shows that he worked seven days a week on seven out of the first twelve weeks that he worked with the Employer.

November, the Employer paid him approximately two hundred dollars.

On November 23, 2000, Thanksgiving Day, the Claimant went to Port Dania to fix the generator on a ship called the *Manatee*. This was one of several tasks given to him by the Employer to complete. Two members of the boat's crew were onboard when the Claimant arrived. The Claimant boarded the *Manatee* and entered the cabin. Once inside the cabin, the Claimant was alone and could not be seen by the two crew members. As the Claimant climbed down a ladder into the engine room, he reportedly fell and landed on his left knee and buttocks. The floor in the engine room is made of steel. The Claimant's buttocks and back struck the ladder during the fall. No one witnessed or heard the Claimant fall. Although in pain, the Claimant stated that he was able to walk over and check the generator panel. The Claimant climbed back up the ladder and left the boat without discussing his fall with the two crew members onboard the Manatee.

The Claimant then drove an hour and fifteen minutes to his fiancé's mother's house, where he was supposed to meet to have Thanksgiving lunch. Tustin and her mother both observed the Claimant suffering immense pain and discomfort. The Claimant told Tustin that he had fallen from a ladder while working. The Claimant laid in a chair for the rest of the afternoon and did not participate in any of the Thanksgiving activities. The Claimant stated that he did not return to work after this date. The Employer alleges that he continued to work for several days into the next pay period.

The Claimant did not report the accident on the day that it occurred because it was a holiday and he believed no one would have been at the office. He first attempted to report the accident on Monday, November 27, 2002, but he could not reach Joe Farrell, the president of Resolve Marine Services (hereinafter "Farrell"). On November 28, 2002, the Claimant attempted to report the accident and spoke with Mr. Shower and Mr. Garrido, employees of the company. During this conversation, the Claimant reportedly discussed his accident on the *Manatee*, as well as his resignation. The Claimant could not reach Farrell until that Wednesday. Farrell testified that the Claimant called him to let him know that he had fallen while working on the *Manatee*. Farrell stated in deposition that he had no reason to believe that it did not occur. The company eventually faxed the Claimant an accident report, and he filled it out and faxed it back to the Employer on December 24, 2002.

The Claimant was eventually authorized to seek treatment at the Indian River Memorial Hospital on December 8, 2000. X-rays taken of the Claimant's spine revealed minimal loss of vertebral height at T-11. The treating physician noted pain in the left knee and in the Claimant's back. Under the initial nurse assessment, it is noted that the Claimant stated that he pinched a nerve in his spine during a work related accident that occurred in August. The Claimant's left knee was drained at the hospital, x-rays of the Claimant's head, back and knee were also taken. The Claimant was referred to Dr. Daniel Benson, a board certified orthopaedic surgeon.

Dr. Benson first examined the Claimant on December 15, 2000. When describing the

Claimant's history, Dr. Benson stated that his own notes only discuss the August accident that occurred in Puerto Rico; however, his assistant's notes do indicate that the Claimant fell a distance of fifteen feet in November. After reviewing the Claimant's x-rays and conducting a physical examination, Dr. Benson concluded that the Claimant suffered from a mechanical lumbar strain with irritated and strained muscles and disuse atrophy of the back and the associated musculature. He also concluded that there was a possible compression fracture of the eleventh thoracic vertebra. Dr. Benson did not consider the Claimant to be totally disabled, and he placed him on light duty status. Dr. Benson stated during the deposition that he was under the impression that the Claimant was working at the time he conducted his examination. Dr. Benson also stated that it was his general impression that the Claimant's injuries were ongoing since the August accident.

Dr. Benson examined the Claimant again on December 29, 2000, noting complaints of radicular pain going into the groin area with testicular pain. Dr. Benson stated during the deposition that radicular pain indicates some kind of compression against the smaller nerves roots, and radicular pain in the groin area is consistent with an injury to the lumber area of the spine. On the date of the exam, Dr. Benson recommended that the Claimant receive an MRI.

Dr. Benson examined the Claimant again on March 9, 2001. The Claimant continued to suffer from lumbar pain. Dr. Benson continued to recommend that the Claimant receive an MRI.

On cross examination, Dr. Benson stated that the Claimant's symptoms were consistent with a trauma related injury. When presented with the report for the MRI scan that took place in September, Dr. Benson agreed that the MRI was compatible with a disc herniation that could be attributable to the November accident. Furthermore, Dr. Benson stated that it would be reasonable to place the Claimant on longer restrictions assuming that the MRI scan showed a localized herniation and the Claimant continued to be symptomatic with pain in those areas. Dr. Benson stated that he was not an expert in the L4/5 area of the spine, but he did not believe that a herniation in that area would cause radiating pain in the groin.

On December 14, 2000, the Claimant and a friend named Britt Bailey were at the Claimant's house eating dinner and drinking alcohol. The Claimant was apparently worried because some of his equipment was being stored in the Employer's warehouse. Bailey reportedly convinced him to drive to the warehouse that evening to retrieve his equipment. The Claimant and Bailey drove to the warehouse in Ft. Lauderdale and loaded several pieces of equipment onto the truck. The warehouse was locked and surrounded by a fence, but the Claimant still had keys to enter. The Claimant loaded a large tool chest and an air compressor onto the back of his truck with a fork lift. The Claimant stated that he did not perform any lifting that evening, and Bailey performed any lifting that was necessary to move the equipment from the forklift to the truck. Bailey corroborated this testimony during the hearing. A witness, Julio Rivas, who worked for the Employer was present at the warehouse that evening; however, he was standing outside the warehouse. Nonetheless, the witness stated that he observed the Claimant lifting several objects and pieces of equipment that evening and loading them into the truck. The Claimant stated that he

did not re-injure or aggravate his back at any point during that evening.

The Claimant apparently took some property that belonged to the Employer that evening. Farrell contacted the Complainant the next morning while he was at Dr. Benson's office and threatened to call the police if the Claimant did not return the property. The Claimant returned the property after leaving Dr. Benson's office.

Dr. Girrard, a board certified orthopaedic surgeon, examined the Claimant on August 10, 2001 to recommend a course of treatment for his back pain. After taking the Claimant's history and conducting a complete physical, Dr. Girrard determined that the Claimant suffered from a lumbosacral strain with a left S-1 joint instability and left knee pain consistent with patella femoral syndrome. An MRI performed on the Claimant revealed central disc herniation with some encroachment on the neurofamine on the right side and at L4/5 level. The report stated that the encroachment around the neuroforamina was bilateral. Dr. Girrard stated that the Claimant's pain on the left side was caused by a left SI joint malalignment that could also cause lower extremity radiculopathy. Furthermore, Dr. Girrard stated that the Claimant's ground injury was consistent with a trauma induced injury as opposed to a degenerative cause, and it was consistent with the SI joint anterior rotation. Dr. Girrard concluded that the Claimant's injuries were directly related to the November 23, 2000 accident.

Dr. Girrard recommended physiotherapy three times a week for approximately six to eight weeks to treat the Claimant's SI Joint injury, and he placed the Claimant on lifting and standing limitations. Dr. Girrard stated that the Claimant would have to avoid strenuous work activity, and he considered him to be partially disabled. Dr. Girrard stated that the Claimant would have to be re-examined after treating the SI injury in order to determine if the disc herniation was an issue.

Dr. Girrard disagreed with a statement by Dr. Jacobs, who had performed an Independant Medical Examination of the Claimant on October 2, 2001, that the lumbar herniation could not be attributable to the November 23, 2000 accident. Rather, he found that the Claimant's SI joint instability was mechanical in nature and attributable to the November accident. Dr. Girrard determined that the November accident was the only cause for the Claimant's pain and injuries, and the mechanism of injury is consistent with the injuries he suffered.

On cross examination, Dr. Girrard admitted that he had never read Dr. Jacob's full report but was only responding to a specific section being read to him by the Claimant's attorney during the direct. He also stated that he only examined the Claimant on that single occasion, and he relied on the history provided to him by the Claimant. According to Dr. Girrard, the Claimant did not state that he suffered from low back pain after the accident in Puerto Rico. He also stated that he did not take any independent x-rays and only relied on the reports provided. Dr. Girrard also did not review Dr. Benson's or Dr. Teal's report. Dr. Girrard stated that his opinion as to what caused the Claimant's injuries might change if there was evidence of an intervening mechanism or event.

Dr. Saks took an MRI of the Claimant's lumbar spine on September 14, 2001. Dr. Saks stated that the significant findings included a dessication and degeneration of the L4-5 disk, in association with a right sided disk herniation. Dr. Saks found this condition to result in impingement on the thecal sac. He also found additional changes that are consistent with an annular tear. The changes also cause narrowing or encroachment upon the nerve root canals of the foramina bilaterally.

On cross examination, Dr. Saks stated that it was possible that prior complaints of back pain by the Claimant could be consistent with a herniated disk, but there were a number of other possible causes. Dr. Saks stated that a disk herniation of this type could result in symptomology ranging from localized back pain and radicular symptoms to no presenting symptoms whatsoever. Therefore, it is possible that the injury was pre-existing.

On October 2, 2001, Dr. Jacobs performed an Independent Medical Examination of the Claimant. The examination lasted approximately ten to twelve minutes. The Claimant stated his symptoms at the time of the examination included back pain, pain radiating down both buttocks and through both legs, numbness over his back and buttocks, and pain in his left testicle. The Claimant did not mention any pain in either knee.

Dr. Jacobs reviewed the MRI scan of the Claimant's lumbar spine and noted that the disk was pressing against the cord itself. Dr. Jacobs stated that this type of injury should produce central to right sided back pain, with possible radicular pain down the right leg to the top of the foot. Dr. Jacobs stated that the Complainant had "complained of some numbness feeling in the back of the left leg, not the right."

Dr. Jacobs concluded that the Claimant suffered from a herniated disk L4-5 from the right and mechanical back pain. He also noted that the Claimant had been involved in two work related injuries. Dr. Jacobs explained that the Claimant suffered from mechanical back pain, which is related to muscle and joint pains, as opposed to radicular pain, which is caused by a nerve being pressed upon by a disk. Dr. Jacobs stated that the right sided herniated disk could not be attributable to the November accident because the expected symptoms for such an injury were not consistent with the Claimant's symptoms--pain on the left side.

Dr. Jacobs noted that a person suffering from injuries like the Claimant's could have good days that would allow him to perform lifting activities. He also stated that the ability to lift a compressor that weighed two hundred and fifty pounds would be inconsistent with the type of injuries that the Claimant suffered from.

On cross examination, Dr. Jacobs stated that he agreed with the findings that the Claimant suffered from moderate central stenosis of the canal and encroachment upon the neural foramen bilaterally. He also stated that the x-rays of the lumbar spine revealed that all disk heights were well maintained except for mild narrowing posteriorly at L5-S1. He stated that his medical opinion was based in part on the fact that there were no medical records for treatment directly

after the November accident. Later in the deposition, however, Dr. Jacobs contradicted his earlier statement and said that he did not agree with the MRI finding that the Claimant suffered from bilateral neural foraminal encroachment. Dr. Jacobs stated that he had treated patients with bilateral foraminal encroachment that caused bilateral pain.

Dr. Jacobs recommended that the Claimant undergo a conservative but aggressive treatment schedule, possibly including steroid injections or disk surgery.

The Claimant testified that he is currently suffering from back pain running down through his buttocks and into his legs. His left testicle occasionally enlarges and becomes extremely sensitive, and the Claimant stated that he has trouble going to the bathroom because of this condition. The pain in his testicle will reportedly last up to a month at time, and the pain is sometimes great enough to make the Claimant nauseous. The Claimant is unable to perform any type of persistent bending due to the pain in his back. The Claimant testified that the pain in his lower back has only become more intense since the accident, but it comes and goes depending on the day. On bad days it is necessary for him to use a cane. He cannot mow his lawn, and it is necessary sometimes for his fiancé to help him put on his shoes. On good days, the Claimant stated that he could wash his truck, although he would need a ladder to clean the top. The Claimant has not worked since the accident, and he has spent the majority of this time resting on his couch. The Claimant stated that he is unable to work full-time, but he could possibly work part-time if the Employer allowed him to choose his hours. He is limited because there are days that he reportedly cannot leave his house due to his injuries. He currently takes Hydrocodone, Soma, and Cellebrex daily for the pain. The Claimant received an MRI and is currently treating with Dr. Girard. The Claimant is currently unemployed and has been living off his savings. His fiancé has also helped to support him.

The Claimant was observed by an ex-employee of the Employer after the date of the November accident. The witness testified that the Claimant walked up to him on a dock and told him that he was "working." The witness stated that he observed grease on the Claimant' hands, but he admitted during cross examination that he never witnessed the Claimant performing any work. The witness stated that he saw him again on the same day riding in a fishing yacht. The Claimant testified that he did not perform any work on that boat but was only instructing the boat owner, Robert McLester, on how to fix it. McLester also stated in deposition testimony that the Claimant was only instructing him how to fix his boat. McLester stated that he did hand the Claimant several filters that weighed three to four pounds each. McLester also stated that he observed the Claimant experiencing back problems on several occasions, and the Claimant turned down several invitations to ride on his boat because he said his back was bothering him. McLester also stated that the Claimant occasionally needed assistance moving from his car to the boat.

The Claimant was also secretly videotaped moving on and off his truck and carrying a chain from the truck. The Claimant testified that he was being careful about his back, and the chain he lifted only weighed 15 pounds. The Claimant was also asked about a prior back injury in

1987. The Claimant stated that he pulled a muscle in his back while helping to move a lawnmower, but it completely healed.

Farrell testified that the Claimant was not covered by longshore insurance at the time of the November accident due to an oversight on the part of their insurance broker. He stated that coverage would be available through an "Errors and Omissions" policy.

Manoharra Ferretti testified at the hearing with regard to Employer's Exhibit 3, a chart of the Claimant's work history. Ferretti is the human resources manager for the Employer, but she was not employed by the Employer during any point at which the Claimant worked there. Ferretti testified that she cross checked the Employer's exhibit summarizing the Claimant's wages against the Employer's cancelled checks and the Claimant's W-2. She confirmed that the Claimant was being paid $150 per day as salary. Ferretti testified that the Claimant was paid for the pay period directly following the November 23 2000 accident, beginning on November 25 and going through December 1, 2000; however, she admitted during cross examination that the check could have been for a late time sheet submission for work done in a previous pay period. She also stated that she could not find any time sheets for work done by the Claimant after November 23, 2000. She also testified that there was no indication in the payroll records that the Claimant suffered an illness between October 1, 2000 and October 27, 2000.

DISCUSSION

Coverage

For a claim to be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, including any dry dock, or that his injury occurred on a landward area covered by Section 3(a) and that his work is maritime in nature and not specifically excluded by the Act. 33 U.S.C. §§902(3), 903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT)(1983); *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Thus, in order to demonstrate that jurisdiction exists, a claimant must satisfy the "situs" and the "status" requirements of the Act. *Id*. The situs test limits the geographic coverage of the Act, while the status test is an occupational concept that focuses on the nature of the worker's activities. *Bienvenu v. Texaco,* Inc., 164 F.3d 901 (5th Cir. 1999) (*en banc*).

The situs test refers to the place where the employee worked or was injured. The situs test provides compensation for an "employee" whose disability or death "results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." 33 U.S.C.§903(a); *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. at 73. A vessel is in "navigation," although moored to a pier, in a repair yard for periodic repairs or while temporarily attached to an object. *Griffith v. Wheeling-*

Pittsburgh Steel Corp., 521 F.2d 31, 37 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976).

In the present case, the Claimant asserts that he was working on the *Manatee* when he was injured. Witness statements from Farrell, the Employer's president, and another employee confirm that the *Manatee* was tied to the dock on the date of the alleged injury. Furthermore, an employee testified that the Claimant was working on the boat on the date in question. Accordingly, the court finds there to be sufficient evidence to establish that the area where the Claimant was injured satisfies the "situs" requirement under the Act.

The status test refers to the position the claimant holds with an employer. Section 2(3) of the Act states that it covers "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship breaker..."

In the present case, the Claimant testified he was given instructions by the Employer to fix the generator on the *Manatee*. The Claimant's assertion is supported by the deposition testimony of Farrell, the Employer's president. (Cx 27/P15/L14-15) As such, the Claimant falls under the category of a ship repairman and should be covered under the Act. Although the Employer has not stipulated to coverage, it has put forth no argument to challenge the Claimant's status. Furthermore, there is no evidence that the Claimant is "a master or member of a crew of any vessel." Accordingly, the status requirement has been met, and this court finds that the Claimant is covered under the Act.

Notice

Section 12(a) of the Act states that "[n]otice of an injury or death in respect of which compensation is payable under this Act shall be given within *thirty days* after the date of such injury or death..." (*Emphasis added*). Section 12(b) states that "[s[uch notice shall be in writing shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall be signed by the employee or by some person on his behalf, or in case of death, by any person claiming to be entitled to compensation for such death or by a person on his behalf." The Board has held that it is presumed under Section 20(b) that the employer has been given sufficient notice pursuant to Section 12, unless substantial and contrary evidence exists. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

The Claimant asserts that proper notice was given to the Employer. In its post-hearing brief, the Claimant argues that a written report was faxed to the Employer on or before December

24, 2000.[3] In support of its position, the Claimant offers a Federal Express envelope (Cx 25) sent from the Employer on December 21, 2000. The envelope is also marked as having been delivered by December 22, 2000. The Claimant testified during the hearing that the envelope contained a blank accident report (Ex 18) that was sent to him when he reported his injury to Mauricio Garrido, an employee of the Employer. The Claimant testified that he subsequently filled out the report and faxed it back to the Employer. The report is dated December 24, 2000, one day beyond the thirty day deadline. The Claimant has offered no evidence to show that the report was submitted on an earlier date. In fact the Claimant testified during the hearing that he faxed the report back to the Employer on December 24, 2000. (Tr. 83/L9) As such, the court finds that proper notice was not given to the Employer within the thirty day period; however, the Claimant's failure to do so is not determinative.

Section 912(d) of the Act states "[f]ailure to give notice shall not bar any claim under this Act (1) if the employer (or his agent or agents or other responsible officials or officials designated by the employer pursuant to subsection (c)) or the carrier had knowledge of the injury or death..." The Claimant asserts in his post-hearing brief that the Employer had knowledge of the injury that occurred on November 23, 2000. The Employer did not address this issue in its post-hearing brief. Having reviewed all the evidence, the court finds there to be sufficient evidence to support the Claimant's position. The Claimant testified that he notified Farrell on or about November 30, 2000 by telephone. (Tr. 82/L 7-15) This testimony is supported by statements made by Farrell during his deposition.

Q. Did Mr. Vinson call on the 27th, that's November?

A. He may have, maybe that's – Give me another question. I'll remember if it was.

Q. Did Mr. Vinson call on November 27th, and tell you he was involved in an accident and ask you to send him to a doctor?

A. No. He told me he had fallen on the tug. I'm not real clear on dates.

Q. Did he say it was no big deal too? Is it what he said?

A. Not really. I'm trying to get the – There was (*sic*) a couple of calls. He called, was going to the doctor or wanted to go and I said, "Yeah."

I don't know the dates, but one of the calls that I knew when he called and said, "Look, I fell on the tug. No big deal." There's probably a couple of phone calls, that would have been the first call, then another call when he said, "I'm going to the doctor."

May have been the 27th.

[3]Initially, the court notes that a report received on December 24, 2000 would be a day past the thirty day deadline.

(Tr. 20/L6-25)

The Claimant's fiancé, Tustin, also testified during the hearing that the Claimant called the Employer within approximately a week after the accident to report his injuries. Tustin also testified that she personally contacted Farrell in November of 2000 to try and make arrangements for medical care. Tustin stated the following:

Q. And what did you tell Mr. Farrell and what did he say to you if anything?

A. That Larry was hurt, that something was wrong. He couldn't get himself comfortable. I wanted to get him to a doctor. His leg and his knee were – something was wrong.

Q. Did Mr. Farrell ask you how he got hurt?

A. No. By that time I believe Mr. Farrell knew.

Q. How do you know that Mr. Farrell knew?

A. Well, Larry had called and reported everything, and I was just trying to make some arrangements to get – get things going so he could get to a doctor, a hospital.

(Tr. 182-83/L22-7)

This evidence sufficiently proves that the Employer was aware of the Claimant's injury. Accordingly, it is determined that timely notice was given to the Employer.

Prima Facie Case

In order to establish a prima facie case, the Claimant must prove that he suffered harm or pain, *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979), and that the accident occurred or the working conditions existed which could have caused the harm. *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). Once a Claimant establishes a prima facie case, the Judge may properly apply the Section 20(a) presumption that Claimant's condition is causally related to his employment. *Kier v. Bethlehem Steel Corp*., 16 BRBS 129 (1984); *Frye v. Potomac Electric Power Co*., 21 BRBS 194 (1988).

In the instant case, the Claimant has documented that he suffered harm or pain. Medical records from the Indian River Memorial Hospital state that the Claimant suffered injuries to his back and left knee, and an MRI taken on September 14, 2001 revealed a broad based right paracentral disk herniation with mild impingement upon the thecal sac. The disk herniation was also acknowledged by Dr. Benson during deposition and by Dr. Jacobs. An annular tear was also

noted in the study. (Cx 15) Dr. Girard examined the Claimant on December 10, 2001 and concluded that he suffered from a lumbosacral strain with left SI joint instability and left knee pain.

The Claimant has also provided evidence that an accident occurred. The Claimant testified during his deposition and during the hearing that he fell from a ladder while working on the *Manatee*. (Tr. 72-73) Farrell testified during deposition that the Claimant reported the accident to him over the phone, and he had no reason to believe that the accident didn't occur. (Cx 27) The Claimant's fiancé also testified that the Claimant told her that he had fallen from a ladder on November 23, 2000 while working on the *Manatee*. In addition, the Claimant's fiancé and her mother testified that they observed the Claimant suffering from extreme pain on November 23, 2000 during the Thanksgiving Day gathering. The Claimant also provided the Dr. Girard's medical opinion stating that he concluded that the Claimant's symptoms are directly related to the November 23, 2000 accident.

Whether this evidence is sufficient to meet the Claimant's initial burden cannot be determined without considering the evidence the Employer has brought forth to challenge the Claimant's credibility. This is particularly important considering that it is undisputed that the Claimant was the only witness to the November accident. The Employer has pointed to the Claimant's six prior felony convictions and several alleged inconsistencies within the transcript to challenge his credibility. The Employer has also presented evidence that the Claimant took equipment from the Employer's warehouse that did not belong to him, and it also presented evidence that the Claimant did not return a thousand dollar advance that was forwarded to him for supplies and expenses. The Claimant admitted during the hearing that he used some of the money to buy medicine. Finally, the Employer has presented a video of the Claimant moving in and out of his truck after the accident, arguing that the Claimant misrepresented his injuries.

Undoubtably, this evidence has placed the Claimant in a tarnished light, and the court has taken this into account when reviewing the record. The court finds, however, that there is sufficient additional evidence to establish that an accident occurred on this date. First, the Claimant's assertion is supported by the testimony of his fiancé and her mother. Both testified that the Claimant showed up to a crowded luncheon on November 23, 2000 in immense pain. Furthermore, an employee of the Employer testified that he witnessed the Claimant onboard the *Manatee* on the morning of the alleged accident. Second, Farrell testified that the Claimant called him and reported the accident, and Farrell stated during deposition that he had no reason not to believe him. Third, the Employer has not presented a credible alternative. The Employer has suggested that the Claimant may have injured his back while loading a two hundred and fifty pound compressor in his truck; however, there is little to no evidence that this ever occurred. In fact, the Claimant and his friend both testified that the compressor was loaded on the truck with a forklift. The other employee stated that he witnessed the Claimant loading objects onto his truck, but he later stated that he was not in a position to see how the compressor was loaded on the

truck. Fourth, the court found the testimony of the Claimant to be generally credible even when considering the attacks on his credibility. Questions of witness credibility are for the administrative law judge as the trier-of-fact. *Michael Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999) *citing Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). Accordingly, this court finds that the Claimant has established a prima facie case and holds that the Section 20(a) presumption applies.

Having determined that the presumption applies, it is now necessary to inquire if the Employer can overcome this burden by establishing that no nexus exists between the decedent's injury and his employment. *Dower v. General Dynamics Corp*., 14 BRBS 324 (1981). If the Section 20(a) presumption is rebutted by the Employer, then it falls out of the case and the judge must weigh all the evidence and then make a finding based on the record as a whole. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). The employer must produce facts, not speculation, to overcome the presumption of compensability, and reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created in Section 20(a). *Dearing v. Director, OWCP*, 27 BRBS 72 (CRT)(4th Cir. 1993)(Unpublished). For the following reasons, I find that the Employer has failed to meet this burden.

In attempting to rebut the Section 20(a) presumption, the Employer has presented the opinion of Dr. Benson and Dr. Jacobs. Dr. Benson diagnosed the Claimant as suffering from a mechanical lumbar strain and a possible thoracic lumbar fracture. He related these injuries back to the August accident in Puerto Rico; however, he admittedly did not take into account the November accident even though his records indicate that the Claimant discussed the injury during the initial consultation. Dr. Benson also stated that it was possible that he was combining the facts surrounding the two accidents because the details were "foggy." When asked about the November accident on cross examination, Dr. Benson stated that it could be a contributing factor to the Claimant's injuries, and the injuries the Claimant sustained were compatible with a trauma injury verses a degenerative type. Even more significant, however, is the fact that Dr. Benson did not have a chance to review the September 2001 MRI before forming his medical opinion. When presented with the MRI study on cross examination he stated that the herniated disks in the Claimant's lumbar spine could be attributable to the November accident. For all these reasons, the court finds Dr. Benson's opinion as to the origin of the Claimant's injuries to be unreliable.

The court is also unpersuaded by the opinion of Dr. Jacobs. Dr. Jacobs performed an Independent Medical Examination on the Claimant and ultimately concluded in the report that the disk herniation of the lumbar spine at L4-5 could not be directly attributable to the November 23, 2000 accident. Dr. Jacobs' opinion appears to be heavily based on the Claimant's pain being primarily right sided. Dr. Jacobs noted that an L4-5 disk herniation to the right like the Claimant's would normally produce lower back pain more right sided than left, with some potential radiating pain into the right lower extremity. During deposition, Dr. Jacobs stated, "The

fact that he says the pain is left sided, the numbness is left sided, says now that there is left testicular pain, does not correlate to that." The court notes, however, that Dr. Jacobs stated earlier in the same October 2, 2001 report that the Claimant reported suffering pain in both the left and right leg. The report states:

> ...back pain all the time. He has pain that radiates to both buttocks. *It radiates down both legs to his knees*, with numbness across his back to his buttocks. He denies any radiation below the knees. He also complains of some pain into the left testicular region. He denies any gastrointestinal or genitourinary dysfunction.

Dr. Jacobs does not appear to have taken this reported bilateral pain into account when making his evaluation. It is noted that Dr. Benson was the first physician to examine the Claimant after the November accident, and his records note general as opposed to right sided lumbar pain.

Dr. Jacobs did state during the cross examination that bilateral leg pain could be caused by bilateral foraminal encroachment, but he believed that the Claimant did not suffer from this condition. This conclusion contradicts the opinion of Dr. Saks, the interpreting radiologist. When asked during the deposition about the neural foraminal encroachment, Dr. Saks stated, "It appears to be in a bilateral fashion." Considering that Dr. Saks is a medical specialist trained in the interpretation of MRI scans, the Court finds his opinion on the matter to be more persuasive than Dr. Jacobs.

Even if the pain was only left sided, the court is unconvinced that the herniated disk could not still be attributable to the November 23, 2000 accident. Dr. Saks and Dr. Girard both stated that a herniated disk could be present without symptoms. In particular, Dr. Saks stated that people walk around everyday with herniated disks without suffering any symptoms. Therefore, a complaint of left sided pain would not necessarily rule out that a person had suffered from a herniated disk during an accident. It is certainly possible that a claimant might be suffering from an symptomatic herniated disk, as well as some other injury that is causing his left sided pain.

This line of reasoning is supported by Dr. Girard's opinion that the Claimant's left sided pains are attributable to a left sided SI joint malalignment. Dr. Girard stated that this type of joint malalignment could produce left lower extremity radiculopathy and various types of symptoms in the left lower extremity, including the left groin pain. Dr. Girard also stated that this injury is consistent with the type of falling accident described by the Claimant. Dr. Girard also disagreed with Dr. Jacob's opinion that the herniated disk could not be attributable to the November accident.

In evaluating whether the Employer has successfully rebutted the 20(a) presumption, the

evidence regarding the Claimant's credibility has been taken into consideration. As stated earlier, the court finds that an accident did occur on November 23, 2000 on the Manatee, and the Employer has provided no evidence to relate the Claimant's injuries to a subsequent accident. Therefore, the court finds this line of evidence to be uncompelling. Having found that the Employer has not rebutted the Section 20(a) presumption, it is determined that the Claimant has met his burden of establishing the existence of a disabling injury caused by his work with Employer.

Average Weekly Wage

In traumatic injury cases, an employee's average weekly wage is determined as of the time of injury for which compensation is claimed. 33 U.S.C. §910; *Hall v. Consolidated Employment Systems*, Inc., 139 F.3d 1025, 32 BRBS (CRT) (5th Cir. 1998). A determination of employee's annual earnings must be based on substantial evidence. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991). The Claimant's testimony may be considered substantial evidence. *Carle v. Georgetown Builders*, 14 BRBS 45, 51 (1980). *But see Mattera v. M/V Mary Antoinette, Pac. King, Inc*., 20 BRBS 43, 45 (1987) (ALJ rejected claimant's testimony due to his lack of credibility).

Section 910 of the Act provides how a claimant's average weekly wage should be determined. A claimant's wages are determined under Section 10(a) of the Act when a Claimant has worked in that line of employment for substantially the whole year preceding the claimant's injury. 33 U.S.C. § 910(a); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 135-36 (1990); *Mulcare v. E.C. Ernst, Inc.*, 18 BRBS 158 (1986). A claimant's wages may be determined under Section 10(b) of the Act when a claimant has not worked in the same or similar position for substantially a year preceding the incident. Evidence of a substitute employee's wages may be used under Section 10(b) to determine the claimant's wages. 33 U.S.C. § 910(b). In order for a claimant's wages to be determined under Section 10(b), evidence of the substitute employee's wages must be introduced into the record. Palacios v. Campbell Indus., 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), rev'g 8 BRBS 692 (1978). Section 10(c) under the Act should be used to determine the claimant's wages when there are no employees of the same class who have worked substantially the whole year preceding the injury. *Walker v. Washington Metro. Area Transit Auth.*, 793 F.2d 319, 321 18 BRBS 100 (CRT)(D.C. Cir. 1986), cert. denied, 479 U.S. 1094 (1987). Section 10(c) is used when the record does not include enough information for the administrative law judge to determine the claimant's average weekly wage under Section 10(a) or Section 10(b). *Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 5 BRBS 23, 25 (9th Cir. 1976), *aff'g and remanding in part* 1 BRBS 159 (1974).

In the instant case, the Claimant did not work in the position or a similar position for substantially the whole of a year. The record indicates that he was self employed before working

for the Employer, and he only worked for the Employer approximately twenty five weeks before suffering the November injury. Therefore, his average weekly wages cannot be determined under Section 10(a). The record is also absent of any evidence of documenting the wages of an employee working in a similar position as the Claimant's, so his average weekly wages cannot be determined under Section 10(b). Accordingly, it is necessary to determine his average weekly wages under the catch all provisions of Section 10(c).

The Claimant has asserted that the earnings record does not reflect fifty two weeks of earnings prior to the accident and also reflects periods in which the Claimant was out of work due to sickness or injury. As such, the Claimant argues that the average weekly wage should be based on his daily salary of $150.00 at the time of the November injury, in accordance with Section 10(c) of the Act. The Claimant argues that he worked between five to seven days a week, so a fair approximation of his wages should be based on a six day work week. This calculates to an average weekly wage in the amount of $900.00.

The Employer has argued that the average weekly wage should be $756.66 with a compensation rate of $509.93 per week. The Employer has not provided any explanation as to how it derived at this figure; however, it is assumed that the Employer calculated this figure by adding together the Claimant's gross pay and dividing the sum by the number of weeks the Claimant was employed. The lower figure presumably represents the net average weekly pay after taxes have been withheld. The court notes initially that the average weekly wage should not be reduced by the effective income tax rate. *Denton v. Northrop Corp*., 21 BRBS 37, 47 (1988).

There is very little evidence in the record with regard to the Claimant's work history. There are no records concerning his wages prior to his employment with the Employer, and there are no specific records as to how many hours a week the Claimant worked. Both parties testified during the hearing or in deposition that the Claimant was earning $150.00 per day at the time of his injury, so there is no debate as to his daily wage. As to the number of days the Claimant worked per week, this is best determined by calculating the average number of days he worked per week over the employment period, not including the three weeks he missed while out of work due to illness. Based on the testimony of the Claimant and Tustin, the court finds that the Claimant did not work after the November 23, 2000 accident, so the week beginning on November 25, 2000 should also be excluded. This averages out to approximately 6 working days per week. At a $150 per day, the Claimant's average weekly wage comes to $900.00 per week. This is determined to be a fair and reasonable approximation of the Claimant's wages. An administrative law judge will be given broad discretion under Section 10(c) of the Act. *Bonner v. National Steel & Shipbuilding*, 5 BRBS 290 (1977), *aff'd in pert.part*, 600 F.2d 1288 (9th Cir. 1979).

Reasonable and Necessary Medical Treatment

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require. 33 U.S.C. § 907(a).

In order for medical expenses to be assessed against the employer, the expense must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry,* 11 BRBS 532, 539 (1979). A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Telephone Co*., 16 BRBS 255 (1984).

Dr. Benson stated during deposition that the Claimant would require physical therapy for his back injuries, and he also stated that he would require an MRI. Dr. Girard stated in his August 10, 2001 report that the Claimant required an MRI and treatment for the back and knee injuries he received in the November 23, 2001 accident. Specifically, he stated that the Claimant would require physical therapy three times a week for six to eight weeks. Dr. Girard also concluded that the Claimant's condition was attributable to the work related accident that occurred on November 23, 2000. Dr. Jacobs, the IME physician, agreed that the Claimant's condition required medical treatment. In his October 2, 2001 report, Dr. Jacobs stated:

> I do not doubt that this patient requires treatment at this point for the lumbar spine. The treatment should likely be conservative in nature with an aggressive therapy program to start, but the patient may ultimately be in need of epidural steroids to the lumbar spine. There is always the possibility of surgery.

Doctor Jacobs did state in the report that he did not believe the Claimant's conditions could be attributed to the November 23, 2000 accident. For reasons stated previously, this opinion has been found to be inconsistent with the preponderance of the evidence. Therefore, it is determined that the Claimant's previous medical expenses were both reasonable and necessary. Furthermore, the Claimant is entitled to future medical treatment, including physical therapy, epidural steroids and surgery if necessary. Future medical treatment shall continue until the Claimant reaches Maximum Medical Improvement (MMI), at which point the Claimant's condition should be reassessed.

Nature and Extent of Total Disability

The Claimant contends that he is totally disabled. Total disability is defined as the complete incapacity to earn pre-injury wages in the same work that the Claimant was performing

at the time of injury or in any other employment. The claimant has the initial burden of proving total disability. To establish a prima facie case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work-related injury. He is only required to show that he cannot return to his former employment. *Elliott v. C&P Telephone Co.*, 16 BRBS 89 (1984). Usual employment is the claimant's regular duties at the time that he was injured. *Ramirez v. Vessel Jeanne Lou, Inc.* 14 BRBS 689 (1982).

The Claimant testified during the hearing that he currently suffers from back and groin pain. He also testified that his position as a mechanic required strenuous activity, including heavy lifting. Dr. Jacobs, the IME physician, stated the following in his October 2, 2001 report:

> In his current state, I would expect the patient to have considerable difficulty with working. I do not see how he could lift anything more than 20-25 pounds. The restrictions are based on the patient's current clinical examination, along with the MRI finding of a disk herniation to the right at the L4-5 level.

Dr. Girard stated in his own report that the Claimant would have to avoid strenuous activity, and he considered the Claimant to be partially disabled.

Dr. Benson stated during deposition that he did not consider the Claimant to be totally disabled, and he could return to work on light duty status. He did state that the Claimant had to avoid bending, squatting and stair or ladder climbing. After reviewing the Claimant's MRI, Dr. Benson amended his opinion and stated that the Claimant might qualify for longer range restrictions.

Based on this evidence, it is determined that the Claimant has established he is unable to return to his former employment. All of the treating physicians have placed the Claimant on restrictions that would not allow him to carry out his previous duties. Furthermore the Claimant has continued to complain of severe back pain that intermittently requires him to use a cane to move around. It is recognized that the Claimant may have "good days" that might allow him to perform more strenuous activities. One of these "good days" may have been captured on the videotape of the Claimant, but the medical evidence is convincing that the Claimant could not have resumed the physical requirements of his former position even on the date in question. Accordingly, it is determined that the Claimant has established a prima facie case that he is totally disabled from returning to his regular or usual employment.

Once a claimant establishes a prima facie case of total disability, the burden shifts to the employer to establish suitable alternative employment. An employer must show the existence of realistically available job opportunities within the geographic area where the employee resides.

The claimant must be capable of performing these jobs considering his age, education, work experience, and physical restrictions. The claimant must also be capable of securing these positions if he diligently tried. *Edwards v. Directo, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980). The Employer is required to prove the availability of actual, not theoretical, employment opportunities by identifying specific jobs available to the employee within the local community. The Act requires that the employer establish realistic job opportunities for the claimant; for the job opportunities to be considered realistic, the employer must establish the precise nature, terms and availability of the alternate positions identified. *Bumble Seafoods*, 629 F.2d 1327, 1329.

The Employer has not presented any evidence of suitable alternative employment for the Claimant. Accordingly, the Claimant is found to be temporarily totally disabled. The date of the disability shall begin on November 23, 2000, the date the Claimant fell from the ladder while working on the *Manatee*.

Attorney's Fee

The Claimant's attorney, having successfully prosecuted this case, is entitled to a fee. The Claimant 's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof, to the Employer's counsel who shall then have fourteen (14) days to comment thereon. A certificate of service shall be attached to the fee petition.

ORDER

Wherefore, the above considered, it is hereby **ORDERED** that:

1. The Employer shall pay the Claimant temporary total disability, beginning on November 23, 2000 and continuing until the Claimant reaches maximum medical improvement.

2. The Employer shall reimburse the Claimant for previous medical expenses attributable to the November 23, 2000 injury and pay for future medical expenses related to the November 23, 2000 accident.

3. The Claimant's attorney shall have 30 days from receipt of this decision and order to file a petition for an attorney's fee. The Employer shall have 14 days from receipt of the Claimant's attorney's petition to file a response.

A

THOMAS M. BURKE

Associate Chief Administrative Law Judge